

**BEFORE THE UNITED STATES DEPARTMENT  
OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE**

**In the Matter of**

**Milk In The Central**

**Marketing Area**

**:**

**: Docket Nos.:**

**: AO-313-A44 et al;**

**: DA-01-07**

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**COMMENTS OF DAIRY FARMERS OF AMERICA, INC.  
PRAIRIE FARMS DAIRY, INC. AND  
SWISS VALLEY FARMS COOPERATIVE  
UPON THE TENTATIVE DECISION**

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**Date: January 21, 2003**

## **I. INTRODUCTION**

These comments are submitted by DFA, Swiss Valley, and Prairie Farms in response to the Tentative Decision and interim final order of the Secretary in this proceeding. We wish to first discuss our strong support for the general findings and principles in the decision and then discuss some of the individual issues and proposals.

## **II. SUPPORT FOR PERFORMANCE-BASED POOLING**

These cooperatives strongly support and commend the Secretary for espousing and implementing performance-based pooling standards for Order 32. We sincerely believe that these principles are essential to the federal order system. Several findings in the Tentative Decision are particularly crucial, foundation stones to the analysis of the issues and proposals in the hearing and we wish to underscore our agreement and support for these findings.

- “[P]ooling milk on the Central order without demonstrating actual performance in servicing the Class I needs of the market area is neither appropriate nor intended.” 67 Fed.Reg. at 69916, col. 1. Pooling milk on this and all federal orders must require demonstrating actual performance in servicing the Class I needs of the market area and the Secretary has properly so stated in this decision.
- “[M]ilk of some producers is benefiting from the blend price of the Central order while not demonstrating actual and consistent service in satisfying the Class I needs of the Central milk marketing area.. This . . . is attributed to

faulty pooling standards.” 67 Fed. Reg. at 69915, col. 3. Again this finding is well documented in the record and is crucial to re-structuring the pooling standards of the order to meet the appropriate standards.

- “[R]eform of federal milk orders did not adopt open pooling, but attempted to provide that each market pool would include the milk that actually is available for serving the fluid needs of the market.” 67 Fed. Reg. at 69921, col. 2. This finding is also crucial to recognizing that the disorder in this Order and others was not the intended product of pooling provisions adopted during the federal order reform process. Therefore, the provisions of each order need to be customized to the marketing conditions which the record establishes for that area.

In this Tentative Decision, the Secretary has expressly recognized the problems which exist because of certain of the pooling standards which were implemented post-reform and has sought to correct those standards to market-appropriate provisions. Identifying market-appropriate provisions also includes, in our view, eliminating provisions which facilitate completely uneconomic transactions, for instance the pooling of milk from locations that could never economically serve the marketing area because of transportation costs; and adopting provisions which will provide economic incentives to make milk available to distributing plants in the marketing area, which is not now the case. (E.g. Tr. 335(Testimony of Gary Lee)) We urge the Secretary to hold fast to these principles in the promulgation of the final decision.

### **III. SUPPLY PLANT POOLING PROVISIONS**

The Tentative Decision clearly and concisely found: “The record of this proceeding strongly supports concluding that the various features of the Central milk marketing order’s

supply plant pooling standards are either inadequate or unnecessary. These deficiencies contained in the pooling standards for supply plants are causing much more milk to be pooled on the Central milk order than can reasonably be considered as properly associated with the Central marketing area. (See, e.g., Exh. 9, Tables 9a, 9b, and Chart 1) Such milk does not demonstrate reasonable levels of performance necessary to conclude that it provides a regular and reliable service in satisfying the Class I milk demands of the Central marketing area.” 67 Fed. Reg. at 69914, col. 3. This finding is unexceptionable and requires the revisions to the supply plant standards adopted in the Tentative Decision which we support as follows:

- There should be no months of “free ride” for supply plants. Pooling should require performance on a year round basis.
- Shipments to other order distributing plants should not serve as qualifying shipments.
- The months of required higher performance (August to February) should be adjusted as set out in the Tentative Decision.
- Net shipments should be required of supply plants so that no qualification can be earned by pumping-in and pumping-out milk at a distributing plant.
- Supply plants located outside the marketing area should not be able to qualify their plant volumes with the direct delivery of milk from farms to distributing plants.<sup>1</sup>

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<sup>1</sup> It is helpful to keep in mind the historical evolution of the role of supply plants to understand the necessity and importance of this provision: In the beginning, bottling plants were supplied from direct farm milk; both parties were very small and balancing issues were resolved either by the plant processing a multi-line of finished goods, picking up cream only or cutting off producers. As plants (and farms) got bigger, a better marketing plan was required. Orders came into existence and once pooling became a standard (overcoming the biggest how-to-share problem), a better way of balancing – using the supply plant -- evolved to match supply and demand. The supply plant could make more storable products from the milk not needed by the bottler and save freight costs also. The

- “Pyramiding” of milk qualification should not be allowed.
- Qualifying shipments should be made to (7)(a) distributing plants only.

We would like to comment further on several of these issues: (1) net shipments; (2) the right shipping percentage level; (3) the possibility of alternate language to address paper pooling of distant milk; and (4) the performance level required of supply plant units.

Net shipments. The net shipments language (applicable to both supply plants and producer milk) is essential to maintaining the integrity of performance-based pooling in our view. In applying this language the perfect implementation would authorize the Market Administrator to match deliveries to and from the supplying handler and eliminate them directly on a “net” basis. We recognize that there may be administrative imperatives which makes such direct netting impractical or, perhaps, unfair in some cases. Therefore, if the language is to be applied on a pro rata basis among all suppliers at a plant, we can accept that implementation. The important point is that the net shipments language means that there will be a “price to pay” by any handler, distributing plant or supplier, for arranging supplies which are not needed but done solely for the purposes of pooling.

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supply plant, in addition to balancing, served to assemble small volumes into larger volumes for delivery efficiencies. Rules were established in orders to define how much association with the fluid market was needed in order for the supply plant to share in the pool. Rules generally were different for in market versus out of market plants. In market had percentages to meet; but the price was always fixed by the in market location adjustments. Out of market plants had the requirement for so much milk to be direct shipped (this is not a new phenomena) and some percentage qualification. However they also had “zoned out” pricing which reduced the blend price by a fixed rate per mile based on distance from the market. This variable changed each month depending on the blend price and served as an economic consequence to be considered in the pooling decision. No one would attach distant milk if it was unprofitable. The determining factor was: Did the market need the milk not do I want to supply it. The Secretary was (and is) charged with balancing the competing interests. The distant supplier always wants to ship to the better priced market and the local supplier wants as little distant milk as possible so as to have the highest local price. Pre-reform provisions already had these type of rules that affected the pooling decision-making process. They are not new constructs. However the price surface in reform deleted the zone out provisions and altered the economic balancing that that pricing provided to the market. This provision does nothing more that reestablish the economic relationship that governed supply plant usage in the first place. It makes supply plants function as they were intended to do. Milk from distant markets can still supply a local market; but it must show performance in the manner prescribed by the Secretary.

The performance required of supply plants. We continue to be of the view that the correct percentage of performance which should be required of Order 32 supply plants is 25% and 20%, rather than 20% and 15% as per the Tentative Decision. The Tentative Decision concludes that these levels advocated in Proposal 1 are “unreasonably high when considering the complete context of the pooling provision modifications made in this decision.” 67 Fed. Reg. at 69916, cols. 2 and 3. The concern is expressed that if adopted, milk which has long been associated with some pre-reform marketing areas may no longer be pooled. *Id.* We urge the Department to reconsider this conclusion. This is not the pre-reform Order 79, from which most of the most permissive pooling standards were adapted. The current Order 32 is a huge geographic marketing area which has Class I demands far beyond those of old Order 79. Shipping requirements of 25% and 20% will only indicate a utilization of perhaps 25% or 30% when the expectations from federal order reform were in the 50% range. Proposal 1 and the Tentative Decision agree on the 20% level for December to February; however, the peak months of August to November, and the spring summer months of March to July should be reevaluated.

Distant, out-of-area milk. The Tentative Decision which eliminates the option for distant supply plants to pool via diversion of producer milk is a good option. This requirement may be attacked here, as is the case in Order 33, as requiring plant milk deliveries when direct shipment is feasible and superior from a milk quality perspective. However, another option would be Proposal 7 which would require performance on a “unit” basis by out of area milk. Such performance could be on a plant shipment or a direct-shipped basis, at the handler’s option. The pro-rata performance would be required via proposal 7<sup>2</sup> and that is the purpose of the language adopted in the Tentative Decision which prohibits diversions from supply plants as qualifying

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<sup>2</sup> As was pointed out at the hearing and in the post-hearing brief, Proposal 7 is supported by DFA and Prairie Farms.

shipments.

Supply plant units. We continue to be of the view that requiring a slightly higher level of performance from supply plant units than individual supply plants is a useful provision in the order.

#### **IV. THE PRODUCER MILK PROVISIONS**

We again commend the Tentative Decision's adoption of performance-based language for producer milk in Order 32. We support the Tentative Decision amendments to the producer milk provisions of the order as follows:

- We support the elimination of pyramid pooling by the amended language regarding diversions of producer milk.
- We support the adoption of diversion limitations on producer milk during all months of the year, thereby eliminating the months of "free ride" or unlimited diversion of producer milk.
- We support the inclusion of net shipments provisions for producer milk.  
These provisions are critical to true performance-based pooling in the order.
- We support the adoption of proposal 8 which prohibits pooling of state order marketwide pool milk.

We offer several additional comments on these issues: (1) net shipments; (2) performance level; and (3) pyramid pooling.

Net shipments. For producer milk, this provision is probably at least as important as it is for supply plant milk. Ironically, perhaps, the comment of the Dean Foods witness underscores the importance of this point. If milk can perform and be pooled by delivery to a distributing

plant and shipment right back out, the order has conferred upon the distributing plant operator the ability and right to sell pooling entitlements over and beyond its need for milk. The plant then has the ability to pool volumes of milk up to (or down to) the level where it has the minimum utilization required for a distributing plant (25% route distribution per Section 7(a) of the order). The order should not facilitate in any respect the sales of pooling rights and net shipments is important to eliminate this. We make the same comments advanced above with respect to interpretation of this provision. We believe that the Market Administrator should be able to “match” shipments in and out and net them when determining qualification. However, if pro rata assignment to all shippers is the only feasible means of administration, it is acceptable.

Performance level. As with respect to supply plants, we request that the Department reconsider the level of diversions allowed. We continue to believe that the levels set in Proposal 5 are reasonable levels which will accommodate all those serving the market, both presently and historically.

Pyramid pooling. We underscore our support for the diversion limitations which will eliminate this practice in Order 32. This is absolutely necessary to have any reasonable level of performance for the market. When it comes to performance, 20% should mean 20% and with pyramiding it does not. As the testimony at the hearing showed, the actual performance required for pooling could go as low as 1 to 16. (Hearing Exh. 9, Table 18) Correcting this artifice is a major step forward in making Order 32 be performance based.

## **V. IMPLEMENTATION PROCEDURES**

These cooperatives strongly support the implementation procedures of the Department with respect to this proceeding. It was imperative that the decision be immediately implemented



on a Tentative Final basis so that a degree of order can be restored as soon as possible in this large and important marketing area. Timing is urgent in light of the pending “free ride” period which will begin in May which, if it begins without order amendments could “lock in” millions of pounds of distant, e.g. California milk, for several more months. The use of the representative month of the hearing is logical and appropriate in our view. The decision should be fully implemented at the earliest possible date; the hearing record fully supports the use of expedited procedures with respect to making the decision a tentative final one, and with respect to publishing an order less than 30 days from implementation, if that is done.

#### IV. CONCLUSION

DFA, Swiss Valley and Prairie Farms respectfully urge the Department to adopt the amendments to Order 32 as set out in the Tentative Decision, at the earliest possible time, with suggested revisions noted herein. This will restore the Order to a performance-oriented pooling system in accordance with the principles for federal order markets enunciated in this decision and over many years by the Department.

RESPECTFULLY SUBMITTED,

By 

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Dated: January 21, 2003

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